No. 18-459

IN THE

Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR INSTITUTIONAL INVESTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Amici are institutional investors who buy, hold, and sell billions of dollars of federally regulated securities. As investors, amici have an interest in both promoting effective enforcement of the Nation's securities laws and deterring baseless litigation whose cost is ultimately borne by shareholders. In amici's view, private enforcement of Section 14(e)'s tender offer provisions serves an essential function in promoting the integrity of financial transactions and investor confidence in our financial markets. While amici support efforts to constrain strike suits, they believe the solution proposed by petitioners and their amici – the complete elimination of private enforcement of Section 14(e) – would do far more harm than good, given the broad range of tools Congress has provided defendants for responding to meritless securities litigation.

Amici include:

The Arkansas Teacher Retirement System provides retirement, disability, survivor, and death benefits to public school teachers and other educationally related employees in the State of Arkansas.

The Florida State Board of Administration manages over $200 billion in assets. It was created by the Florida Constitution and is governed by a three-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

member Board of Trustees, comprised of the Governor as Chair, the Chief Financial Officer, and the Attorney General. The SBA is required to invest assets and discharge its duties in accordance with Florida law and in compliance with fiduciary standards of care.

The National Conference on Public Employee Retirement Systems (NCPERS), which is the largest trade association for public sector pension funds, representing approximately 500 funds throughout the United States and Canada. NCPERS is a unique network of public trustees, administrators, public officials and investment professionals who collectively oversee nearly $3 trillion in retirement funds managed on behalf of seven million retirees and nearly 15 million active public servants, including firefighters, law enforcement officers, teachers, and other public servants.

The New York City Board of Education Retirement System provides pension benefits to approximately 34,000 active and 18,000 retired members, primarily non-pedagogical employees of the New York City Department of Education.

New York City Employees' Retirement System is a public employee retirement system that provides retirement, disability, and death benefits to over 350,000 active and retired New York City employee participants.

The New York City Fire Department Pension Fund is a single-employer public employee retirement system serving full-time uniformed employees of the New York City Fire Department. It serves over 28,550 active and retired members, including widows and beneficiaries.

The New York City Police Pension Fund provides pension benefits for uniformed members of the New York City Police Department and currently serves approximately 88,000 active and retired members and their beneficiaries.

The Public Employee Retirement System of Idaho provides retirement, disability, survivor, and other benefits to more than 155,000 members. Its membership is comprised of retirees, beneficiaries, and active public employees working for more than 795 employers across the State of Idaho.

The Teachers' Retirement System of the City of New York provides retirement benefits for approximately 200,000 current and former employees of the New York City Department of Education, participating New York City Charter Schools, and the City University of New York.

SUMMARY OF ARGUMENT

For the reasons given by respondents and other amici, the Court should reject petitioners' assertion that Section 14(e) of the Securities Exchange Act of 1934,[2] 15 U.S.C. § 78n(e), requires proof of scienter. The Chamber of Commerce nonetheless urges this Court to eliminate the long-recognized private right of action to enforce Section 14(e) on the ground that the cost of such litigation outweighs its benefits. That policy argument fails, disregarding the manifest benefits of private enforcement while exaggerating the incidence and cost of meritless merger litigation. At the same time, on the Chamber's own telling, its proposed solution will have no actual effect because savvy plaintiffs, it says, can simply replead their Section 14(e) claims under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), whose private right of action the Chamber does not challenge. That is not correct – Section 14(e) covers additional important ground. But even if the Chamber were right, that would just mean that having identified a problem of questionable urgency, the Chamber proposes no real solution. Its brief therefore gives this Court no reason to address the validity of Section 14(e)'s private right of action, particularly given petitioners' failure to raise the issue in the lower courts.

I. The Chamber's attack on private enforcement of Section 14(e) is meritless. This Court and Congress have repeatedly recognized that private enforcement of our securities laws provides a vital supplement to the limited enforcement capacity of the Securities and

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[2] Ch. 404, 48 Stat. 881 (15 U.S.C. § 78a *et seq.*).

Exchange Commission (SEC). *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (collecting citations). This includes private enforcement pursuant to private rights of action inferred by the courts decades ago that have become an established part of the congressional design. *See ibid.* (discussing implied right of action under Section 10(b)).

Indeed, the SEC itself has recently emphasized how stretched its resources have become. Recent hiring freezes and budget cuts have reduced the agency's enforcement staff and capabilities, even while "securities markets have grown increasingly complex and opaque," making efforts to manipulate it "increasingly complex and more difficult to identify." SEC, *Fiscal Year 2019 Congressional Budget Justification Annual Performance Plan* 24 (*SEC FY2019 Justification*).[3] At the same time, private enforcement provides remedies to investors genuinely injured by violations of the law and creates a deterrent counterweight to the enormous financial incentives for fraud.

To be sure, private enforcement also creates a risk of abusive litigation. But Congress and the courts have been extremely attentive to that risk, providing defendants a variety of tools to dismiss meritless cases early on, to limit discovery before a motion to dismiss is resolved, and to impose severe sanctions on the filing of frivolous claims. As the Chamber itself describes, the Delaware Court of Chancery – which has traditionally decided the bulk of merger litigation – has also recently undertaken to clamp down on disclosure-only settlements in which defendants

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[3] *Available at* https://www.sec.gov/files/secfy19congbudgjust.pdf.

provide immaterial additional disclosures and pay significant attorney's fees. Federal courts are starting to follow suit.

II. The Chamber nonetheless complains that a handful of plaintiffs' firms are seeking to evade those protections by filing Section 14(e) cases in federal court and extracting quick settlements in exchange for dismissing their claims. Because the settlements are never filed in court, the Chamber resorts to speculating about their terms, which it assumes offer no value to shareholders and represent nothing more than frivolous strike suits. If those assumptions were valid, amici would agree that the pattern of suits is troubling and should be discouraged. But the Chamber exaggerates the extent of any problem, which does not justify the draconian response of eliminating private enforcement altogether.

First, the number of cases the Chamber identifies as suspicious is small. It cites fewer than three suspicious settlements per year between 2003 and 2016 (and none before that). And while it asserts a spike in 2016 and 2017, the number falls by nearly a third in 2018, and to an annualized rate of only six cases per year based on the early data from 2019. In none of these cases did the plaintiffs obtain (or even ask for) a preliminary injunction that would have prevented a merger from closing. Nor is there evidence of any discovery taking place or other indications that substantial litigation costs were imposed. The only cost the Chamber identifies is attorney's fees. But even those costs are modest. The Chamber's own authorities show that the cases are settling for a fraction of the attorney's fees that have traditionally been awarded and conclude that it is

"questionable whether [mootness fees] are sufficient to sustain a litigation practice in this area." Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603, 626 (2018) (*Shifting Tides*); *see also* Chamber Br. 26-27 (citing *Shifting Tides* as principal empirical authority on voluntary dismissals). The Chamber thus is asking the Court to make long-term decisions about the enforcement of Section 14(e) based on what is at best a minimal problem that may well be a short-term phenomenon that will correct itself.

Second, even as described, the costs of this small number of allegedly troublesome settlements are dwarfed by the benefits of private enforcement. A single settlement in one recent Section 14(e) case obtained $290 million in relief for injured investors, more than *ten times* the amount of attorney's fees the Chamber estimates was extracted through *all* the recent suspicious settlements the group highlights. And that is before taking into account the substantial benefits created by the deterrent effect of private enforcement.

Third, to the extent an intolerable number of obviously meritless suits continues to be filed, it will be because defendants have elected to tolerate, and even encourage, them by failing to engage in any meaningful resistance. As noted, Congress has provided defendants numerous tools for avoiding shake downs. Yet the defining characteristic of the cases the Chamber cites is that the defendants have agreed to settle the cases before availing themselves of *any* of those protections. That is, even though Congress has enacted heightened pleading standards to facilitate motions to dismiss, even though Congress has directed that discovery be stayed pending any

motion to dismiss in order to reduce settlement pressures, even though Congress has authorized courts to review the substance and attorney's fees of proposed class settlements, and even though Congress has directed courts to issue sanctions against attorneys filing frivolous claims, the Chamber's defendants have uniformly failed even to file a motion to dismiss and instead have worked with plaintiffs to avoid judicial scrutiny of the settlements and fees. Defendants cannot claim that private Section 14(e) enforcement must be eliminated in order to get rid of lawsuits that Defendants themselves could eliminate, but have chosen to finance instead.

All of which may be why none of the authorities the Chamber cites – including its own prior reports on the purported problems with merger litigation – has recommended elimination of private Section 14(e) litigation.

III. The Chamber ends its discussion by explaining that its proposed solution will not actually address any of the problems it has claimed to identify. It says that the Court should not be concerned about eliminating private Section 14(e) suits because they can all be repleaded as private Section 10(b) suits (the validity of which the Chamber does not question). That is not correct. For example, Section 14(e) addresses forms of insider trading not captured by Section 10(b). But even if the Chamber were right, that would just mean that eliminating the Section 14(e) right of action will do little to discourage the filing of merger strike suits.

That being so, there is no reason for this Court to address whether a private right of action for Section 14(e) claims exists. The case was litigated below on

the assumption that private enforcement was permitted, and this Court can easily resolve the case on the same understanding.

ARGUMENT

Petitioners' principal argument in this Court – and the only argument made to the Ninth Circuit panel – is that Section 14(e) requires proof of scienter. As respondents and others have explained, that argument lacks merit. Petitioners also argue for the first time in this Court that even if Section 14(e) does not require scienter, the Court should reverse on the ground that there is no private right of action for Section 14(e) violations. In support of that request, the Chamber of Commerce argues that "the costs of recognizing such a right significantly outweigh the benefits." Br. 19. "In particular," it claims, "an examination of Section 14(e) litigation over the past twenty-three years shows that the Section 14(e) private right has become little more than a costly vehicle for plaintiffs' attorneys to extract fees from corporate acquisitions involving tender offers." *Ibid.*

Respondents and other amici demonstrate that petitioners' attack on the long-settled private right of action to enforce Section 14(e) is unfounded as a matter of legal doctrine. This brief explains why the Chamber's naked policy argument lacks merit as well. In particular, the Chamber ignores the substantial benefits of private litigation as a supplement to the necessarily limited capacity of the SEC. It vastly overstates the significance of meritless Section 14(e) litigation, which is already subject to substantial constraints imposed by Congress and the courts. The Chamber further ignores that the settlements it

decries arise only because defendants elect not to use any of the defensive tools at their disposal, and instead collaborate with a small number of plaintiffs' firms to produce settlements that evade judicial review. And the Chamber inexplicably concludes its argument with an assurance that eliminating the Section 14(e) private right of action won't change any of this anyway, because plaintiffs can simply refile the same claims under Section 10(b).

All of which is no doubt why none of the authorities the Chamber invokes – including prior reports by the Chamber of Commerce itself – has ever suggested that any problem with strike suits be dealt with by eliminating private enforcement of Section 14(e). And it is why the Court should not decide in this case the validity of the Section 14(e) private right of action.

I. The Chamber's Attack On Private Enforcement Of Federal Securities Law, And Section 14(e) In Particular, Is Unfounded.

The Chamber's purported cost-benefit analysis blinks reality. This Court and Congress have long recognized that private enforcement of federal securities laws plays an important, complementary role to federal regulators' efforts to police the massive number of transactions that occur in the world's largest economy. At the same time, Congress and the courts have been attentive to the risk of abuse, providing defendants multiple means to eliminate meritless suits at the outset, relieve settlement pressures, and reduce financial incentives for filing baseless litigation in the first place.

A. Congress And This Court Have Long Recognized The Benefits Of Private Enforcement Of Federal Securities Laws, Including Through Implied Rights Of Action.

Congress has repeatedly recognized that "private securities-fraud litigation furthers important public-policy interests, prime among them, deterring wrongdoing and providing restitution to defrauded investors." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 475 (2013) (citing H.R. Rep. No. 104-369, at 31-32 (1995) (Conf. Rep.)). Congress has found, for example, that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action." H.R. Rep. No. 104-369, at 31. Moreover, these "private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." *Ibid.*

"Both Republican and Democratic Chairmen of the Securities and Exchange Commission have stressed the integral role of the private right of action in maintaining investor confidence." S. Rep. No. 104-98, at 37 (1995). For example, in 1991, the Chairman under President George H.W. Bush testified:

> Private actions under Sections 10(b) and 14(a) of the Exchange Act have long been recognized as a 'necessary supplement' to actions brought by the Commission and as an 'essential tool' in the enforcement of the federal securities laws. Because the

> Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws, private actions perform a critical role in preserving the integrity of our securities markets.

Ibid.; *see also id.* at 38 (quoting 1995 testimony of Chairman under President Clinton to same effect).

As this testimony illustrates, the widespread acknowledgement of the value of private enforcement extends to implied rights of action, such as those recognized under Sections 10 and 14. For example, in the face of complaints principally about class actions under the implied right of action for securities fraud under Section 10(b), Congress did not choose to eliminate private enforcement, but instead enacted a variety of reforms to it through the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. *See generally Amgen*, 568 U.S. at 475-76. Thus, while the PSLRA states that it does not "create or ratify any implied private right of action," 15 U.S.C. § 78j-1 note, this Court has recognized that the statute is premised on Congress's understanding that Rule 10b-5 (17 C.F.R. § 240.10b-5) class actions would remain a "prominent feature of federal securities regulation." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

Other legislation has similarly responded to judicial decisions concerning implied rights of action by altering the details of the cause of action, rather than eliminating private enforcement altogether. *See, e.g.*, *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 293-94 (1993) (explaining that

after the Court adopted a short statute of limitations for Rule 10b-5 actions, "Congress intervened by limiting the retroactive effect of our decision") (citing 15 U.S.C. § 78aa-1).

B. Private Section 14(e) Actions, In Particular, Serve Important Purposes.

Private enforcement of Section 14(e) plays an equally important role in enforcing federal securities laws and maintaining the integrity of U.S. capital markets.

1. Private Enforcement Of Section 14(e) Is Essential To Supplement The SEC's Limited Enforcement Resources.

To start, no one can doubt that the requirements of Section 14(e) are of critical importance to maintaining the integrity of tender offers. Congress recognized that accurate information about the terms of the deal and the companies involved is essential to arriving at a fair valuation. *See, e.g.*, H.R. Rep. No. 90-1711, at 3-5 (1968); S. Rep. No. 90-550, at 2-4 (1967). Much of that information – *e.g.*, the offeror's plans for the company post-merger, the details of its financing, etc. – is inaccessible to shareholders except through disclosures by the parties proposing (or opposing) the deal. Those parties have a natural incentive to misrepresent or omit information in order to advance their preferred position. And many involved often have substantial financial incentives to shade the truth, or outright defraud investors, given the enormous stakes involved. With so much at stake, the injuries resulting from misrepresentations and frauds can be immense. Moreover, when fraud infects such consequential business transactions, faith in financial

institutions and markets inevitably suffers, to the detriment of the broader economy.

The requirements of Section 14(e) are, therefore, obviously important. But they do little good unless there is a credible threat of enforcement. "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (describing role of litigation under implied private right of actions to enforce Section 10(b)); *accord Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). So has Congress. *See, e.g.*, S. Rep. No. 104-98, at 8 ("'[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program.'") (quoting former SEC Chairman Arthur Levitt).

None of this is surprising. The Chamber does not – and could not seriously – claim that the SEC has the resources to adequately scrutinize compliance with Section 14(e) on its own. The SEC is charged with overseeing "approximately $75 trillion in securities trading annually . . . and the activities of over 26,000 registered market participants." *SEC FY2019 Justification*, *supra*, at 3. "In addition, the SEC is responsible for selectively reviewing the disclosures and financial statements of over 8,000 reporting companies." *Ibid.* It must also evaluate the

"approximately 16,500 tips and complaints" it receives each year. *Id.* at 24.

The SEC recently told Congress that the "volume of potential securities violations continues to rise," *SEC FY2019 Justification*, *supra*, at 25, even while the Commission's enforcement staff has shrunk in response to budget cuts and a hiring freeze that had been in place since late 2016, *id.* at 3. *See also* SEC, *Division of Enforcement Annual Report* 4 (2018)[4] (reporting that SEC's "total headcount is down approximately 10% from its peak in FY 2016"); *id.* at 5 ("Due to budgetary constraints, we have lost many of our contracted legal support personnel and we have been subject to an agency-wide hiring freeze, limiting our ability to replace employees who have departed.").

As a result, the SEC's enforcement division has faced "significant challenges" "that stretch its limited resources." *SEC FY2019 Justification*, *supra*, at 23. For example, the Commission must struggle to keep up with the technological changes that have "dramatically transformed our markets" while enhancing "the ability of wrongdoers to engage in cyber-enabled misconduct," including "by hacking into the electronic accounts of others and then forcing trades to pump up a stock price, or the brokering of stolen inside information on the 'dark web,' paid for in untraceable cryptocurrency." *Id.* at 24. At the same time, the lawful "securities markets have grown increasingly complex and opaque" making efforts to

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[4] *Available at* https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

manipulate them "increasingly complex and more difficult to identify." *Ibid.*

2. Private Section 14(e) Litigation Benefits Investors And The Public.

Private enforcement of Section 14(e) brings real benefits to investors and, through its deterrent effect, financial markets more broadly.

The recent cases challenging pharmaceutical company Valeant's tender offer to acquire Allergan (another drug company best known for producing Botox), provide an example. Prior to launching its tender offer, Valeant entered into a confidential agreement with a hedge fund management company, Pershing Square, under which Pershing would use its own money and funds from Valeant to purchase a 10% stake in Allergan. When Valeant later made a hostile tender offer to acquire Allergan, Allergan's stock price soared. Even though Valeant's tender offer ultimately failed (Allergan agreed to be acquired by another company at a higher price), Valeant and Pershing nonetheless reaped a $2.3 billion profit by selling the 10% stake they had quietly purchased in advance of the tender offer. *See Basile v. Valeant Pharm. Int'l, Inc.*, No. 8:14-cv-2004, Dkt. 639 Ex. 2, at 2-19 (C.D. Cal. Aug. 14, 2018) (*Valent* Summary Judgment Order) ("tentative order" granting in part plaintiffs' motion for partial summary judgment).

Investors subsequently sued Valent and Pershing, alleging violations of Section 14(e).[5] After the district

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[5] Implementing regulations deem trading on the basis of nonpublic information relating to a tender offer to be a

court tentatively granted plaintiffs' partial summary judgment, the case settled,[6] providing $290 million in relief to investors.[7]

Such settlements remedy investor injuries, but also provide a powerful deterrent effect. The Allergen case, for example, was widely publicized in the securities community as a disastrous outcome for both defendant companies and a warning to the industry as a whole.[8]

"fraudulent, deceptive or manipulative act or practice" under the statute. 17 C.F.R. § 240.14e-3(a).

[6] *See Valent* Summary Judgment Order at 1, 68.

[7] *See* David Benoit & Jonathan D. Rockoff, *Pershing Square, Valeant to Pay $290 Million to Settle Allergan Suit*, Wall St. J. (Dec. 29, 2017), https://www.wsj.com/articles/pershing-square-valeant-to-pay-290-million-to-settle-allergan-suit-1514571214.

In comparison, an SEC enforcement action related to the same merger netted a mere $15 million in penalties for a violation of reporting requirements. *See* Press Release, SEC, *Allergan Paying $15 Million Penalty for Disclosure Failures During Merger Talks* (Jan. 17, 2017), https://www.sec.gov/news/pressrelease/2017-16.html.

[8] William D. Cohan, *Ackman Admits Mistake, but Chipotle Bet Could Be Another*, N.Y. Times (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/business/dealbook/ackman-admits-mistake-but-chipotle-bet-could-be-another.html (calling Valeant investment "disastrous"); *see also* Mark Terry, *Arrogance and Greed: Ackman, Valeant Pay $290M to End Allergan Insider Trading Lawsuit*, BioSpace (Jan. 2, 2018), https://www.biospace.com/article/unique-arrogance-and-greed-ackman-valeant-pay-290m-to-end-allergan-insider-trading-lawsuit/; Antoine Gara, *Bill Ackman and Valeant Settle Allergan Insider Trading Lawsuit for $290 Million*, Forbes (Dec. 30, 2017), https://www.forbes.com/sites/antoinegara/2017/12/30/bill-ackman-and-valeant-settle-allergan-insider-trading-lawsuit-for-290-million/#aaf3c861f326.

C. Congress And The Courts Have Provided Ample Means For Responding To Strike Suits, Short Of Eliminating The Private Right Of Action.

To be sure, a private right of action can be abused. But Congress and the courts have been attentive to this risk, providing defendants multiple ways to end meritless litigation quickly and courts a variety of ways to discourage strike suits.

In the PSLRA, Congress rejected calls to eliminate private enforcement of the Nation's securities laws in favor of providing a battery of new protections for defendants and requirements for plaintiffs' counsel. The statute imposed, for example, "[e]xacting pleading requirements" that require, among other things, that plaintiffs plead with particularity "both the facts constituting the alleged violation, and the facts evidencing scienter" when scienter is required. *Tellabs*, 551 U.S. at 313. It also provided "a 'safe harbor' for forward-looking statements" and, to prevent the costs of discovery from driving defendants to a premature settlement, mandated "a stay of discovery pending resolution of any motion to dismiss." *Amgen*, 568 U.S. at 476 (internal quotation marks omitted).

Moreover, judicial decisions in litigated cases (including summary judgment decisions in cases eventually settled, like the Allergan litigation) "have an impact beyond a single case in that they announce standards of conduct that guide participants in future transactions." *Shifting Tides*, *supra*, at 611-12.

To reduce the incentive for litigation seeking "extortionate settlements," Congress further "limit[ed] recoverable damage and attorney's fees," "impose[d] new restrictions on the selection of (and compensation awarded to) lead plaintiffs," and "mandate[d] imposition of sanctions for frivolous litigation." 568 U.S. at 475-76 (internal quotation marks omitted).[9]

As the Chamber itself has described, courts have taken additional steps in response to concerns about disclosure-only settlements providing insubstantial additional information to shareholders while providing substantial attorney's fees. Br. 24. In *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 887 (Del. Ch. 2016), for example, the Delaware Court of Chancery announced it would scrutinize the materiality of such disclosures before allowing significant fees. *See* Chamber Br. 24.

Federal courts have the same authority and responsibility, and some have already announced their intention to follow *Trulia*'s lead. For example, in *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (7th Cir. 2016), the Seventh Circuit embraced *Trulia*'s heightened scrutiny for disclosure-only settlements, then added that proposing a settlement that offers shareholders nothing but immaterial new disclosures may be grounds for replacing class counsel or even dismissing the suit. *See id.* at 725-26. Other courts

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[9] To prevent plaintiffs from avoiding these requirements by filing parallel claims under state law in state court, Congress enacted the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, which forbids courts from maintaining class actions alleging state law claims based on material misrepresentations or omissions in connection with the purchase or sale of securities. *See* 15 U.S.C. § 78bb(f)(1)(A).

have since followed suit, including in the Ninth Circuit. *See, e.g.*, *Sanchez v. IXYS Corp.*, 2018 WL 4787070, at *5 (N.D. Cal. Oct. 2, 2018).

II. The Chamber Fails To Identify Any Special Problem With Private Section 14(e) Litigation That Warrants Eliminating The Established Private Right of Action.

The Chamber nonetheless argues that the manifest benefits of private enforcement in this context are outweighed by a scourge of strike suits that have managed to evade the measures intended to prevent them. Br. 27. In particular, it claims that in the three years since *Trulia*, a handful of plaintiffs' firms have filed a number of Section 14(e) suits in federal court, only to voluntarily dismiss the cases in short order, presumably on the basis of a settlement. Although the settlements were not filed in court, the Chamber assumes they involved the defendants making immaterial supplemental disclosures and paying attorney's fees. *Id.* 26-27.

The Chamber's inferences are questionable. But to the extent the evidence suggests that some firms have made a business of filing meritless challenges to mergers in order to extract quick settlements of no value to shareholders, amici condemn that practice and agree it should be discouraged. However, as discussed, Congress and the courts have already provided defendants ways to avoid expensive litigation of meritless securities claims and to deprive unscrupulous lawyers of any significant financial incentive to file them. The Chamber's evidence suggests at best that some defendants have elected not to avail themselves of those protections when they can

settle cases for relatively small amounts. The Chamber cannot bootstrap that defense strategy into a reason to eliminate private enforcement of Section 14(e) altogether.

A. The Chamber's Disparagement Of Section 14(e) Litigation In General Is Unsupported.

There is little support for the Chamber's assertion that merger litigation in general, and Section 14(e) litigation in particular, largely consists of meritless strike suits.

For example, the Chamber says that "in 2017, 89 percent of all deal cases were dismissed," Br. 26, implying that this shows private Section 14(e) claims overwhelmingly lack merit. But the source it cites was reporting the disposition of cases filed in 2017 *and resolved by March 2018*, which was only a portion of the cases filed and an obviously unrepresentative sample. *See Shifting Tides*, *supra*, at 622-23 & tbl.2 n.*.[10] Another source more accurately reports that as of early 2018, only 4% of 2017 merger cases had been dismissed by courts. Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* 6 (2018). Another 72% had been settled or voluntarily dismissed, and 24% remained pending. *Ibid.* The Chamber itself reports that more generally, only 28%

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[10] *See also* Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis* 15 (2018) ("Historically, cases that have taken longer to settle have been associated with higher settlements.").

of merger litigation is dismissed. U.S. Chamber Inst. for Legal Reform, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy* 9 (2018) (*Rising Threat*) (describing dismissal rate between 2003 and 2011).[11] That some additional number of cases are dismissed as part of a settlement says nothing about their merit. After all, cases with obvious merit can be expected to settle, and to do so early.

The Chamber nonetheless claims that most Section 14(e) suits are proven meritless by the fact that they result not in money judgements but in changes to the disclosures before the transaction takes place. Br. 23. But that, again, does little to show that the suits lacked merit or were filed to extract attorney's fees. One would think it is a *good* thing for the lawfulness of a firm's disclosures be settled *before* the transaction closes, thereby avoiding the prospect of protracted post-closure litigation with massive damages claims. Moreover, it is hardly surprising that such suits result in changes to corporate disclosures rather than increases in the tender offer or other monetary relief – Section 14(e) regulates only disclosures, not the substantive terms of an offer. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Shifting Tides*, *supra*, at 628. That is why cases that include challenges to the term of offers have historically been brought in state court (usually the Delaware Court of Chancery), which can entertain breach of fiduciary duty theories addressing the

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[11] None of the Chamber's data relates specifically to Section 14(e) claims.

substance of the deal. *See* Chamber Br. 24.[12] Therefore, one would expect that Section 14(e) claims seeking to *prevent* damage to shareholders *before* a deal closes would result in disclosure settlements.

The Chamber says that the disclosures provide no value to shareholders. Br. 22. To the extent the Chamber implies that disclosures are worthless as a general matter, that simply represents disdain for Congress's decision to require that material statements made in a tender offer be true and to forbid omissions that render material statements misleading. To the extent the Chamber is claiming that the specific disclosures required in the settlements it cites are immaterial, it provides no evidence for that claim, failing to give even a single example of an allegedly meaningless disclosure in the supposed legion of meritless suits it complains about. *See id.* 22-29.

And, of course, the Chamber itself points to a seemingly effective set of responses to valueless disclosure settlements that has been adopted in the Delaware Court of Chancery, including rejection of the settlement and reduction (or elimination) of attorney's fees. *See* Br. 24-25. The Chamber asserts that this set of responses has more or less put an end to such

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[12] It is in the context of *that* kind of litigation – in which plaintiffs originally allege that a company's directors violated their fiduciary duties in supporting a tender offer, but then settled for further disclosures with "no monetary compensation to the stockholders" – that the Delaware Court of Chancery has expressed concern about potential strike suits. *Trulia*, 129 A.3d at 891-92.

settlements in Delaware, notably without the courts eliminating private merger litigation altogether. *Ibid.*

B. The Chamber Overstates The Significance Of Section 14(e) Litigation Settled Through Voluntary Dismissals.

The Chamber says, however, that unscrupulous lawyers are now fleeing Delaware for the federal courts. Br. 24-26. And it says that some of those firms have devised a strategy to avoid judicial scrutiny of settlements and fee awards, agreeing to dismiss their suits voluntarily in exchange for disclosures and fee payments made without judicial supervision. *Id.* 26-27.

Notably, the Delaware Court of Chancery, whose decision the Chamber otherwise embraces, does not share the Chamber's dark view of this practice. Indeed, in *Trulia*, the court called mootness dismissals the "preferred scenario" and a "logical and sensible framework for concluding the litigation." 129 A.3d at 897. It reasoned that

> [a]fter being afforded some discovery to probe the merits of a fiduciary challenge to the substance of the board's decision to approve the transaction in question, plaintiffs can exit the litigation without needing to expend additional resources (or causing the Court and other parties to expend further resources) on dismissal motion practice after the transaction has closed. Although defendants will not have obtained a formal release, the filing of a stipulation of dismissal likely represents the end of fiduciary challenges over the transaction as a practical matter.

Id. at 897-98. At the same time, the Court explained that even when the parties negotiate attorney's fees without the court's supervision, there remains two tiers of protection against abusive dismissal settlements. First, the settlement obviously cannot occur without the agreement of the defendant's corporate officers. *Id.* at 898. Second, under Delaware corporation laws, those officers are permitted to enter such settlements only if they provide notice to stockholders "to protect against 'the risk of buy off' of plaintiffs' counsel." *Ibid.* Shareholders are then entitled to object to the expenditure, in court if necessary. *Ibid.* With those protections "against potential abuses in the private resolution of fee demands for mooted representative actions," *Trulia* affirmed "the propriety of proceeding in that fashion." *Ibid.*

That said, to the extent that such settlements represent a pattern of some law firms filing meritless litigation in the hopes of extracting a quick settlement that benefits only themselves, amici, as institutional investors, condemn it as contrary to the interests of shareholders and inconsistent with ethical legal practice. But the problem described does not warrant the Chamber's proposed response, for several reasons.

1. The Chamber Documents, At Best, A Small – And Quickly Diminishing – Number Of Concerning Cases.

While frivolous litigation should never be condoned, it cannot ever be completely avoided. The mere existence of some such litigation cannot, therefore, be grounds in itself for precluding all lawsuits to enforce statutory provisions that embody

critical protections for the investing public and our financial markets. And in this case, even accepting the most sinister explanation of the Chamber's data, the brief describes a small handful of firms extracting relatively small fees with relatively little disruption of firms' merger plans. Whether that pattern of litigation will persist is very uncertain, and there are strong reasons to believe it is unsustainable.

Start with the numbers. The Chamber does not identify any problematic filings between Section 14's enactment in 1968 and 2003.[13] Between 2003 and 2015, it identifies an average of fewer than three suspicious cases per year. *See* Chamber Br. App. 5a-8a.[14] It then cites 13 cases in 2016 (the year of the *Trulia* decision), spiking to 41 cases in 2017, before falling substantially to 29 cases in 2018. *Id.* 1a-5a. In the first two months of 2019, it found a single case. *Id.* 1a. If that trend continues, the Court should expect only six such cases this year.

To be clear, amici condemn the imposition of even minimal costs through frivolous litigation. But the Chamber asks the Court to compare the costs and benefits of private enforcement of Section 14(e). Br. 19. The substantial benefits of private enforcement – including settlements providing hundreds of millions

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[13] *See* Chamber Br. App. 8a-9a (identifying cases in which injunctive relief was requested but the case was dismissed without any significant docket activity occurring, listing first such case as arising in 2003). Although the database the Chamber used contains data stretching back to 1996, it cites no problematic cases for the first seven years covered by the data set.

[14] That is, 32 cases over the course of 13 years.

of dollars in relief to investors, the deterrent effect that protects all shareholders and the integrity of national financial markets, and the reduced need to expand SEC enforcement resources – vastly surpass the modest costs the Chamber purports to identify. The Chamber estimates that its suspected strike suits settled for $265,000 in attorney's fees on average, in the context of mergers valued in the hundreds of millions (sometimes billions) of dollars. *Id.* 27 (citing *Shifting Tides*, *supra*, at 625). In none of the cases did the plaintiffs obtain a preliminary injunction that could interfere with a merger's closing. Nor is there any indication that any of the cases resulted in any meaningful discovery or other litigation costs or distractions – the Chamber itself emphasizes the emptiness of the dockets. *Id.* 20-21.

In the end, the relief afforded investors in the Allergen settlement alone ($290 million) dwarfs the less than $23 million in attorney's fees the Chamber estimates were extracted in *all* the allegedly meritless suits it identifies in its appendix as occurring since the *Trulia* decision.[15]

2. The Practice The Chamber Describes May Not Be Financially Sustainable.

Even if most voluntary dismissal cases represented illegitimate strike suits, there is reason to believe the practice is unsustainable over the long term.

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[15] The Appendix lists 84 cases filed since 2016 and classified as "Injunctive Relief Case Dismissed Without Significant Activity." *See* Chamber Br. App. 1a-5a; *see also id.* 27 (estimating average settlement of $265,000).

On the Chamber's telling, the "overwhelming majority" of voluntary dismissal cases are brought by just five law firms that have made challenging mergers essential to their business model. Br. 21. Because voluntary dismissals occur without class certification, these firms are unable to offer defendants a principal benefit provided by court-approved settlements: a release of claims by all class members. The settlement value of the case is therefore predictably lower. *See Shifting Tides*, *supra*, at 626 (finding that mootness fees "are below the medians for disclosure-only settlements").

As a result, the Chamber's principal authority on mootness fees found that "it is questionable whether [mootness fees] are sufficient to sustain a litigation practice in this area." *Shifting Tides*, *supra*, at 626. That is, "mootness fees may not provide an adequate financial payoff to warrant the filing of low-value cases in the long term, despite the current sharp uptick of cases." *Id.* at 639.

Indeed, as noted earlier, the number of voluntary dismissals has already started falling off substantially. What may prove to be a temporary blip in litigation practice is no basis for making long-term decisions about the future of Section 14(e) enforcement.

C. Voluntary Dismissal Settlements Exist Only Because Defendants Are Willing To Agree To Them.

If, despite these indications, an intolerable number of obviously meritless suits continue to be filed, it will be because defendants have elected to tolerate, even encourage, them by failing to engage in any meaningful resistance.

As discussed, defendants have ample means for eliminating frivolous litigation at an early stage. This has led some litigators to observe that although the "*Trulia* decision has incentivized plaintiffs and their lawyers to seek more favorable jurisdictions," they "should not expect success in federal court." Abby F. Rudzin et al., *From Chancery Court to Federal Court: The Obstacles to a Post-*Trulia *Migration*, 50 Rev. Sec. & Commodities Reg. 41, 46 (2017) (*Obstacles*).

That is, plaintiffs with weak cases should not expect success if defendants put up a fight. But a principal feature of the practice the Chamber describes is defendants' failure even to attempt a motion to dismiss before agreeing to settle these cases. These defendants cannot claim that a quick settlement was needed to avoid the prospect of a preliminary injunction, *see* Chamber Br. 23, because defendants are settling the cases before the plaintiffs even ask for a preliminary injunction, *id.* 21 & n.7. "This puts plaintiffs — whose primary leverage is their ability to threaten the merger's timing — at a significant disadvantage because the merger may proceed while the motion to dismiss is pending." *Obstacles*, *supra*, at 45. Nor can defendants claim that the threat of discovery costs coerced them – under the PSLRA, the filing of a motion to dismiss automatically stays discovery absent a court order finding a special need for it. *See* 15 U.S.C. § 78u-4(b)(3)(B).

At the same time, fee awards to plaintiffs' counsel avoid judicial scrutiny only because defendants have agreed to pay them out of court. Until the past few years, defendants seemingly insisted on settlements and fee awards that required judicial approval. *See* Chamber Br. 24-25.

Finally, if defendants are paying fees sufficient to make the enterprise profitable, they are financing the very litigation they claim to need protection from. The Chamber's members cannot fairly insist that they need radical changes to our system of enforcing securities laws to protect themselves from a stratagem they already have the power to defeat but have chosen instead to facilitate.

D. None Of The Authorities The Chamber Cites, Including The Chamber's Own Prior Reports, Has Suggested That The Solution To Any Problem With Merger Litigation Is The Elimination Of Private Enforcement.

Notably, none of the authorities the Chamber relies upon to establish that there is an alleged problem with vexatious merger litigation urge the complete elimination of private enforcement in this area, much less the elimination of the Section 14(e) private right of action in particular. This includes, most remarkably, the Chamber's own reports.

The authors of the *Shifting Tides* study, for example, emphasize that "caution is warranted until the full impact of the recent changes" become clear. *Shifting Tides*, *supra*, at 639. For example, they resist even the far more modest suggestion of imposing a fee-shifting regime in Delaware courts, warning that it could deter meritorious litigation and thereby "inadvertently cut off valuable shareholder monitoring efforts" that benefit investors and "provide courts with the opportunity to lay out the rules of the road for deals." *Id.* at 636. Eliminating private litigation, they warn, would "eliminate valuable cases that generate

compensation to injured shareholders and deter future managerial wrongdoing." *Id.* at 637. At the same time, they predict that other responses may adequately address the problem the Chamber perceives: "Federal courts may treat disclosure claims and settlements with similar skepticism to that shown by the *Trulia* decision. And mootness fees may not provide an adequate financial payoff to warrant the filing of low-value cases in the long term, despite the current sharp uptick of cases." *Id.* at 639.

The Chamber's own public reports investigating the alleged problem of strike suits in merger litigation likewise never suggest that the appropriate response is the elimination of private enforcement. *See* U.S. Chamber Inst. for Legal Reform, *The Trial Lawyers' New Merger Tax* 9 (2012) (suggesting only reforms designed to funnel merger litigation into the jurisdiction of the firm being acquired); *Rising Threat*, *supra*, at 23 (urging Congress to enact reforms to "[d]eter the filing of meritless cases" and "[p]rohibit abusive practices," but not suggesting elimination of private enforcement). The Chamber has recognized that such reforms "will not entirely eliminate the problem of abuse" by private litigants, but until now has been content to "make it much more difficult for trial lawyers to collect their litigation tax." *New Merger Tax*, *supra*, at 10.

III. On The Chamber's Own Account, Eliminating Private Section 14(e) Enforcement Will Do Nothing To Address The Problems It Asserts.

Finally, the Chamber ends its policy argument by emphasizing that eliminating the Section 14(e) private

right of action will not, in fact, materially affect how plaintiffs litigate merger cases on the ground. It says that plaintiffs will still be able to challenge mergers though the uncontested private right of action under Section 10(b). Chamber Br. 27. Of course, those suits would have to allege scienter. *Ibid.* But the Chamber then notes that all of the cases it cites in its appendix were brought in circuits that required scienter for Section 14(e) suits as well. *Ibid.* If the Chamber is right that Section 14(e) litigation can just be refiled under Section 10(b), what is to stop plaintiffs from refiling the same suits under a different provision? And why should anyone expect defendants to begin standing up to allegedly frivolous lawsuits when nothing has changed but a statutory citation in the complaint? The Chamber does not say.[16]

In fact, Section 14(e) does do separate work in at least some circumstances. For example, the Allergan litigation described earlier alleged a form of insider trading that presumably could not be brought under Section 10(b), given this Court's decision in *Chiarella v. United States*, 445 U.S. 222 (1980). That case held that Section 10(b) prohibits trading on nonpublic information about an impending merger offer only if the defendant had a duty of loyalty to the affected shareholders (*e.g.*, because the defendant was a

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[16] To the extent the Chamber implies (*see* Br. 27-28) that injunctive relief to stop a merger would be unavailable under Section 10(b), it cites no authority for that proposition, and amici are aware of none. Nor would it seemingly matter. *See, e.g.*, Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vand. L. Rev. 1053, 1058 (2013) (merger settlements driven in significant part by desire to eliminate "potentially large contingent liabilities").

"corporate insider" at the company to be acquired). *See id.* at 232-35; *see also id.* at 233-34 (contrasting Congress's different treatment of tender offers in the Williams Act, Pub. L. No. 90-439, 82 Stat. 454). Thus, the SEC's regulation prohibiting anyone from trading on nonpublic information relating to the tender offer is premised on the Commission's authority under Section 14(e), not Section 10(b). *See* 17 C.F.R. § 240.14e-3(a) (defining prohibited conduct as a "fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act").[17]

In any event, even if the Chamber were right that the vast majority of Section 14(e) claims can be recast as Section 10(b) violations, that would just mean that there is no practical reason for eliminating the longstanding private right of action to enforce Section 14(e), or even to address the question in this case.

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[17] The Chamber also acknowledges that the nontendering shareholder may not have standing under Section 10(b) because they are neither purchasers nor sellers of securities. *See* Br. 28 n.9

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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